IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1975 OF 2005

Rajesh Laxminarayan Pancharia ..Applicant

V/s.

State of Maharashtra & Anr. ..Respondents

Mr.Srikant Shivade with Mr.B.L.Sharma for the applicant.

Mr.S.R.Shinde APP for Respondent/State.

Mr.D.A.Nalawade for Respondent No.2/CBI.

Coram : R.S.MOHITE,J

Date : 19.05.2005.

PC

1. This is an application filed by original accused no.2 Rajesh Pancharia, who is involved as an accused in DCB CID FIR No.122/2004 for alleged offences under Sections 120-B, 384, 387, read with 34 of IPC and section 3(1) (ii), 3(2) and 3(4) of the MCOC Act 1999.

2. The matter is being heard and disposed of in vacation in pursuance of liberty granted to the applicant to move the matter in vacation.

3. Heard both sides and I have also perused the record which has been produced before me by the

learned Counsel appearing for Respondent No.2. The State of Maharashtra is a formal party in this case. Since the matter is serious one, I heard the Advocates at length. There are 4 accused in this case who are :- 1) Accused No.1 Jamiruddin Ansari ; 2) Accused No.2 Rajesh Pancharia (present applicant); 3) Accused No.3 Anis Kaskar and 4) Accused No.4 Mohammed Mansuri. Of these 4 accused, accused no.1 Jamiruddin has been arrested on 10.10.2004 and accused no.2 Rajesh Pancharia was arrested on 11.10.2004. The other 2 accused have not yet been arrested as they do not reside in the country.

4. The brief facts of the case are as follows :-

(a) The present applicant is running a unit by name of "Raj Engineers" situated at Faridabad and he is running this business since 21.6.1999. His company is a registered company. He is an income tax payer and it has been fairly conceded by the learned APP that his manufacturing unit in Faridabad does exist and is a regular functioning business.

(b) The case of the applicant is based upon certain documents which have been taken into custody during the investigation. The brief chronology based upon these documents is as follows :-

(i) In January-2002 the applicant gave an advertisement in the name of his company "Raj Engineers" in respect of his machines. On 2.3.2002, one "Alif International" which has its office in Mumbai referring to his advertisement requested the applicant to send the brochure. This letter was written to the applicant-company at Faridabad in Harayana. Pursuant to this letter, the applicant company sent a brochure regarding their Gutkha filling and pouch packing machine to "Alif International". Thereafter, on 15.3.2002 "Alif International" addressed a letter to M/s.Raj Engineers acknowledging the receipt of the catalogue and price list and stating that they have a requirement of 5 machines of model R.E.100. They mentioned that as soon as the machines are ready for delivery the applicant would forward proforma invoice to enable him for making payment immediately.

(ii) On 28.3.2002 the applicant sent their proforma quotation-cum-invoice in which the cost of the machinery was shown as Rs.2,40,000/-, 10% was shown as CST, making a total price of Rs.2,64,000/-.

(iii) On 5.4.2002 "Alif International" sent a demand draft no.812871 dated 5.4.2002 drawn in favour of

M/s.Raj Engineers as an advance for 5 machines of model RE 100. Subsequently, another Demand draft dated 8.4.2002 for the balance amount of Rs.4,000/- also came to be sent.

(iv) Thereafter the applicant insured the 5 machines and dispatched the same on 9.4.2002 through Baba Road Lines, Bombay. Consignment was sent to M/s.Alif International at Mumbai.

5. Alif International is an exporting firm of which 2 partners are the Complainant in the case, "Mustafa" and one "Arif". On receipt of the machines, in due course of their export business, these machines were dispatched after completion of all export formalities to M/s.Ali Ajgar & Co. at Dubai and it is the prosecution case that the same machines were then forwarded to Karachi and were received by some associates of Anis Kaskar for the purpose of starting local business of gutkha in Pakistan.

6. About two & a half years thereafter, on 27.9.2004 DCB CID unit registered an un-related case being DCB CID L.A.C. No.60/2004 under Sections 3, 7 & 25 of the Arms Act against accused no.1 Jamiruddin.

7. During the investigation of the 2nd case the police recorded a detailed statement of the present Complainant Mustafa. Mustafa disclosed in his statement that he had exported 5 gutkha packing and pouch filling machines to Dubai because he has been threatened by Jamiruddin. He stated that in February-2002 that he and his partner had been forced by the said Jamiruddin under threat of a gun to export such machines to Dubai. In his statement he has stated that 2 to 3 days thereafter, Jamuruddin, driver of the applicant alongwith the present applicant had a meeting with 2 partners of Alif International i.e. Mustafa and Arif at Swapna Cold Drinks house at J.J.Hospital. The statement of Mustafa and Arif are to the effect that at this meeting Jamiruddin told them that the present applicant was the business partner of Anis Kaskar in his Fire gutkha business. On the basis of this statement the police registered C.R.No.249/2004 against Jamiruddin and Rejesh. Jamiruddin was arrested on 10.10.2004 and Rajesh was arrested on 11.10.2004. On 12.10.2004 it is alleged by the prosecution that under a discovery panchanama a fax said to have been sent by the firm of Anis Kaskar from Pakistan to the applicants Company i.e. Raj Engineers in Faridabad which is said to have been discovered at his Thane office. Subsequently approval was given by the competent authority on

21.10.2004 and sanction under 23(2) was given on 21.1.2005.

8. On perusing the entire material collected by the Investigating officer it is clear that the prosecution case against the present applicant rests on the following circumstances :-

(I) A statement made by the Complainant Mustafa and his partner Arif that sometime in February-2002 accused no.1 Jamirrudin, during a meeting in Swapna Cold Drinks House had told them that the present applicant was a partner of Anis Kaskar in his Fire Gutkha business.

(II) A discovery statement dated 10.12.2004 as the consequence of which a fax copy alleged to have been sent from the firm of Anis was seized from the Thane office of the applicant was seized.

(III) The statement of the co-accused Jamirrudin that he talked to the applicant regarding the machines and the applicant told him that he had already talked to Anis regarding sending of these machines.

(IV) A statement of accused no.1 Jamiruddin that

subsequently the applicant gave some spare-parts on receiving payment for the same, pursuant to the fax message said to have been discovered.

9. It is an admitted position and it is not seriously disputed that the applicant is conducting a regular business at Faridabad since 1999. His family resides in Faridabad and he had sales office at Thane. The fact that he had and has a regular business is not seriously disputed. The entire correspondence which has also being produced before the Investigating officer indicates that the transaction of selling these machines was not to any member of an organised crime but was infact to the Company of the Complainant who is a victim in this case. The sequence of events which commences from the advertisement in January-2002 and ends with dispatched of these machines includes various letters and correspondence thereafter, payment by two Demand drafts indicates that this was not a covent or a secret transaction, behind close doors but was an ongoing event which continued for 3 months in usual course of business on the strength of usual commercial documents were executed.

10. In so far as accused no.1 is concerned, it is not the prosecution case that he is involved in any continuing un-lawful activity within the meaning of

Section 2(d) of the MCOC Act. It was fairly conceded that there are not more than one charge-sheet filed against accused no.1 within the preceding period of 10 years. What follows there from is Jamiruddin himself is not involved in any organised crime,though he may still be involved in abetting such crimes in eyes of law. It is true that as against Jamiruddin there is an allegation made by the Complainant that he threatened him at the point of the gun to arrange for the export of the gutkha filling and pouch packing machines. It is the contention of the prosecution that this threat was given to the complainant at the behest of Anis. Be that as it may, it is fairly conceded that the present applicant was not involved in any way with the incident relating to the giving of threats to either Mustafa or his partner or anyone else and was infact not present on that occasion. Therefore, there is no question of abetting his act of giving threats to the complainant. As regards the other circumstance about accused no.1 informing the complainant Mustafa and his partner Arif that the applicant was a partner of Anis Kaskar in his gutkha business in Dubai, the police have recorded the confessional statement of accused no.1. On perusal of the said statement it is absolutely clear that accused no.1 Jamiruddin himself does not state that he informed Mustafa and partner Arif about the

applicant being a partner of Anis Kaskar. Another peculiar feature which I have noticed is that while recording confessional statement of accused no.1 the usual question which preceeds such statement, to ascertain whether the accused is giving the same voluntarily have been put by the recording officer but after putting this question he has concluded that as a result of the answers to his question the accused "Mohammed Anas Shaikh" is giving the statement voluntarily. This is a shocking state of affairs because the person so mentioned is not the person jamiruddin whose statement is being recorded at all. Prima facie, I feel that this lapse may reduce to veracity of the statement given by accused no.1 Jamiruddin.

11. The learned Sessions Judge who rejected the bail was impressed by a discovery of a fax message said to have been recovered from the present applicant under a discovery panchanama dated 12.10.2004. However, on perusal of the said so called fax message, it is found that the said fax message bears neither a date nor the usual fax endorsement which would definitely find it place on the top of the document. When the learned APP was asked about this, he stated that the document was got notorised and unfortunately, the notary put his notorial stamp in such a way that the fax

endorsement and the date thereon were concealed under the stamp. This is another strange and shocking aspect of the matter as this document was a crucial piece of evidence. In the absence of any date on fax endorsement, it is impossible to say as to when or whether this is the document received by fax at all.

12. The handing over of some spare parts at the later date to accused no.1 Jamiruddin, in my view by itself could not amount to abetement of an organised crime. Manufacturing of gutkha, packing and pouching machines is a legitimate business. Sale of such machinery and spare parts is not per se illegal.

13. The facts of this case shows that the applicant received nothing more than the price of these machines and spare parts. There is no material to show that he had any dealing in Pakistan or a partner of any business in Pakistan or received any profit or money from abroad . There is also no other material to show that he was indulging in any kind of criminal activity. In fact his lack of antecedent leads me to believe that he is not a person who may indulge in any crime under the MCOC Act.

14. The Apex Court in the case of **Ranjeet Singh Sharma V/s. State of Maharashtra** in Criminal Case No.523 of 2005 while dealing with the restrictive provision relating to bail under MCOC Act observed as under :-

> We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA.

. Further in the same Judgment the Apex Court has further observed as under :-

Section 21(4) of MCOCA does not make any distinction between an offence which entails punishment of life imprisonment and an imprisonment for a year or two. It does not provide that even in case a person remains behind the bars for a period exceeding three years, although his involvement may be in terms of Section 24 of the Act, the court is prohibited to enlarge him on bail. Each case, therefore, must be considered on its own facts. The question as to whether he is involved in the commission of organized crime or abetment thereof must be judged objectively. Only because some allegations have been made against a high ranking officer, which cannot be brushed aside, may not by itself be sufficient to continue to keep him behind the bars although on an objective consideration the court may come to the conclusion that the evidences against him are not such as would lead to his conviction. In case of circumstantial evidence like the present one, not only culpability or mens rea of the accused should be prima facie established, the Court must also consider the question as to whether the circumstantial evidence is such whereby all the links in the chain are complete.

The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail However, such an offence in future must be an offence under

> the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence. 15. Having stated above, I wish to make it clear that any observation made in respect of the applicant would have no bearing what-so-ever upon the other accused and their case would stand on different footing. The observations made in this order are also restrictly confined to the question of grant of bail and will have no bearing or will not be used at the time of trial.

15. In view of the aforesaid findings, it is directed that the applicant be released on bail in the sum of Rs.1,00,000/- with one or two sureties in the like amount subject to the condition that prior to his release, he will be required to surrender his pass-port to the jail authorities who will forward the same to the Duty officer ACB CBI Tanna House, Colaba Mumbai for safe custody. He will also not leave Thane district without prior intimation to the duty officer ACB CBI Tanna House, Colaba, Mumbai in writing. Prior to his release on bail, he will inform the address where he intends to reside to the jail authorities in writing.

16. Application stands disposed of.

. Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary/Court

Sheristedar of this Court as a true copy.

(R.S.MOHITE,J)